No. 14947.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN FOSTER DULLES, as United States Secretary of State,

Appellant,

vs.

TAM SUEY JIN,

Appellee.

APPELLANT'S OPENING BRIEF.

LAUGHLIN E. WATERS,
United States Attorney,

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief of Civil Division,

JAMES R. DOOLEY,
Assistant U. S. Attorney,
600 Federal Building,
Los Angeles 12, California,
Attorneys for Appellant.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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Jurisdiction.

Appellee, plaintiff in the Court below, brought action in the District Court, seeking to be declared a national of the United States [R. 3-5].[1] Jurisdiction was invoked pursuant to Section 503 of the Nationality Act of 1940, 54 Stat. 1171-1172, 8 U. S. C. A., Sec. 903 [R. 5]. Appellant contends that the Court below was without jurisdiction of the subject matter, since appellee had not been denied a right or privilege as a national of the United States upon the ground that she was not such a national at the time her Complaint was filed on December 22, 1952 [R. 5], or before the repeal of Section 503 of the Nationality Act of 1940.[2]

Since the judgment of the District Court [R. 16-17] was a final decision, this Court has jurisdiction of an

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[1]"R" refers to the printed Transcript of Record.

[2]Section 503 was repealed by Section 403(a)(42) of the Immigration and Nationality Act of 1952, 66 Stat. 280, effective December 24, 1952 (See, Sec. 407 of the Immigration and Nationality Act of 1952, 66 Stat. 281).

appeal from that decision pursuant to 28 United States Code, Section 1291. However, the jurisdiction of this Court ends if it finds that the District Court was without jurisdiction of the subject matter (*United States v. Corrick,* 298 U. S. 435, 440 (1936)).

Statement of the Case.

On December 22, 1952 appellee filed a Complaint in the District Court under Section 503 of the Nationality Act of 1940, seeking a judgment declaring her to be a national of the United States [R. 3-5]. She alleged that she was born in China on April 28, 1941 of legally married parents [R. 3]; that her alleged father was a citizen of the United States at the time of her birth [R. 3]; that he had resided in the United States since May 17, 1923 [R. 3-4]; that she had "heretofore" filed at the American Consulate General in Hong Kong for an American passport or other travel document to come to the United States to reside at her father's residence in California [R. 4]; that the Consulate General "has refused to issue to plaintiff the passport applied for" [R. 4]; and that the appellant had denied her the privilege of entering the United States as a citizen on the ground that she was not a United States national [R. 5].

During trial[3] appellant moved to dismiss appellee's action pursuant to Rule 12(b)(1) and (6) and Rule 12(h), Federal Rules of Civil Procedure, on the grounds that the court lacked jurisdiction over the subject matter of the action and that the Complaint failed to state a claim

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[3]The case was consolidated for trial with *Tam Hem Fook v. Dulles,* No. 14,293-HW Civil and *Tam Hem Wing v. Dulles,* No. 14895-HW Civil [R. 11]; however, these two cases are not involved in the present appeal.

upon which relief could be granted [R. 8-11, 13, 21-23]. The certified passport file relating to appellee [R. 23-57], which had previously been received in evidence as Plaintiff's Exhibit 1 [R. 12, 21] supported this Motion [R. 9, 10-11]. This file disclosed that appellee's passport application was executed on May 6, 1952 [R. 28]; that on July 13, 1954 an American Vice Consul recommended that the application be denied [R. 29]; that another vice consul concurred in this recommendation on July 15, 1954 [R. 29]; and that the Department of State disapproved the application on September 23, 1954 [R. 28].

Also received in support of appellant's motion as Defendant's Exhibit C [R. 21, 22] was an authenticated Statement Regarding the Processing of Passport Applications at the American Consulate General in Hong Kong [R. 58-69]. This statement disclosed, among other things, that with the closing of the American Consulate at Canton in 1949, a heavy load of citizenship cases was transferred to Hong Kong [R. 58]; that applications later descended on the Consulate General at Hong Kong at the rate of 150 per month [R. 59, 61]; that lack of funds, personnel, and office space limited the number of applications which could be processed [R. 64-65]; that as of September 1, 1952, more stringent examination and investigation procedures were authorized, since the State Department's review of citizenship claims passed upon at Hong Kong convinced it that a large number of fraudulent claimants were proceeding to the United States [R. 62]; and that the more detailed examination and investigation of claims and the incidence of court actions requiring work on applications for certificates of identity under Section 503 slowed down the rate of processing claims [R. 62].

The District Court denied appellant's motion to dismiss on the ground that the delay of approximately seven and one-half months in acting on appellee's passport application prior to the time her suit was brought was unreasonable and a denial of appellee's rights and privileges as a national and citizen of the United States [R. 13, 21-23; Finding of Fact IV, R. 15]. Judgment was entered declaring appellee to be a national and citizen of the United States of America [R. 16-17].

Statement of Points.

I.

The District Court was without jurisdiction to declare appellee a national or citizen of the United States, since appellee was not denied a right or privilege as a national of the United States upon the ground that she was not a national of the United States prior to the repeal of Section 503 of the Nationality Act of 1940.

II.

The District Court erred in denying appellant's Motion to Dismiss for lack of jurisdiction over the subject matter and for failure to state a claim upon which relief can be granted.

III.

The District Court erred in its Finding of Fact IV.

Questions Presented.

1. Do the facts establish the jurisdictional requisite for an action under Section 503 of denial on the ground that appellee is not a United States national?

2. Does the savings clause of the 1952 Act permit a suit as to which there was no jurisdiction when Section 503 was repealed to be jurisdictionally revived by virtue of an express administrative denial of the claimed right after the new Act took effect?

Statutes Involved.

Section 503 of the Nationality Act of 1940, 54 Stat. 1171, 8 U. S. C. A., Section 903, provides in pertinent part:

> "Sec. 503. If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States * * *."

Section 405(a) of the Immigration and Nationality Act of 1952, 66 Stat. 280, 8 U. S. C. A., note following Section 1101, provides in pertinent part:

> "Sec. 405. (a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed * * * to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes, [*sic*] conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act, are unless otherwise specifically provided therein, hereby continued in force and effect * * *."

ARGUMENT.

I.

Summary.

In order to maintain her action under Section 503 of the Nationality Act of 1940, appellee was required to prove as a jurisdictional requisite that at the time her Complaint was filed she had been denied a right or privilege as a national of the United States upon the ground that she was not a national of the United States. Appellee had not been denied such a right or privilege, either actually or constructively when her action was instituted. There was no denial in fact, since the State Department did not disapprove appellee's passport application until September 23, 1954. Nor was there an implied denial. The finding of the District Court to the contrary, although nominally a finding of fact, was in substance a conclusion of law, and this Court is not bound by the rule that findings shall not be set aside unless clearly erroneous. Nevertheless, in view of the statutory duty imposed upon appellant to make an administrative determination of appellee's nationality prior to issuing a passport; the scant evidence submitted by appellant to aid in such determination; the inability, due to appellee's place of birth and prior residence, to verify her nationality through official sources; and the congestion of the administrative calendar at the American Consulate at Hong Kong, caused by a deluge of similar applications; the finding of the District Court that a delay of approximately 7½ months in passing upon appellee's passport application was unreasonable was clearly erroneous.

Nor did the savings clause contained in the Immigration and Nationality Act of 1952 permit appellee's suit

to be jurisdictionally revived by virtue of the denial of her passport application after the new Act took effect. The language in *Fujii v. Dulles,* 224 F. 2d 906 (C. A. 9, 1955), to the contrary was not essential to a decision of that case, and this Court may regard the issue as not having been previously adjudicated. The "right" to institute an action under Section 503, being solely procedural in nature, does not come within the purview of general phrases contained in the savings clause, such as "right in process of acquisition." Moreover, an application of the latter phrase to actions under Section 503 runs counter to the manifest intent of Congress, which expressed dissatisfaction with the operation of the statute, and meant to strictly limit its operation by setting up a new procedure for determining claims to cititzenship. Even if the savings clause in the 1952 Act could be construed to encompass a "right" to bring suit under Section 503, appellee's action would not be revived, since jurisdiction depends upon the state of things existing at the time suit is brought.

II.

The Facts Do Not Establish the Jurisdictional Requisite for an Action Under Section 503 of Denial on the Ground That Appellee Is Not a United States National.

A. Jurisdictional Requisites for an Action Under Section 503.

In *Dulles v. Lee Gnan Lung,* 212 F. 2d 73 (C. A. 9, 1954), this Court laid down the jurisdictional requirements for an action under Section 503 of the Nationality Act of 1940 as follows (p. 75):

> "Section 503 of the Nationality Act of 1940, 8 U. S. C. A. §903, did not give any court jurisdic-

tion of any action other than an action instituted by a person *who had claimed a right or privilege as a national of the United States and had been denied such right or privilege by a Department or agency, or executive official thereof, upon the ground that he was not a national of the United States.*" (Emphasis added.)

There are no presumptions in favor of the jurisdiction of the courts of the United States (*Grace v. American Central Ins. Co.,* 109 U. S. 278 (1883); *Ex parte Smith,* 94 U. S. 455 (1876)). Consequently, the requisites for jurisdiction as enunciated in *Lee Gnan Lung* must not only be alleged in the pleadings (*Elizarraraz v. Brownell,* 217 F. 2d 829 (C. A. 9, 1954); *Clark v. Inouye,* 175 F. 2d 740 (C. A. 9, 1949)); but, if challenged in any appropriate manner, must be supported by competent proof (*McNutt v. General Motors Acceptance Corp.,* 298 U. S. 178 (1936); *Celite Corporation v. Dicalite Co.,* 96 F. 2d 242, 249 (C. C. A. 9, 1938)).

It was therefore incumbent upon appellee to prove that at the time her complaint was filed, she had been denied a right or privilege as a national of the United States upon the ground that she was not a national of the United States.

B. There Was No Express Denial.

Clearly, there was no express denial of appellee's passport application, either at the time her action was instituted on December 22, 1952 [R. 5] or when Section 503 of the Nationality Act of 1940 was repealed on December 24, 1952. The passport file relating to appellee discloses that after December 24, 1952, testimony was taken [R. 33-40], blood tests and clinical examinations were con-

ducted [R. 42-49], and data was obtained from the Immigration and Naturalization Service in the United States [R. 50-54] in an effort to verify appellee's claimed relationship. This file also shows that on July 13, 1954, an American Vice Consul recommended that appellee's passport application be denied [R. 29]; that another Vice Consul concurred in this recommendation on July 15, 1954 [R. 29], and that the application was disapproved by the Department of State on September 23, 1954 [R. 28]. Thus, there was no express denial of appellee's passport application until September 23, 1954.

C. There Was No Implied Denial.

The District Court did not find an express denial, but assumed jurisdiction on the ground that the delay in acting upon appellee's passport application prior to the time her action was filed was unreasonable and "a denial of plaintiff's rights and privileges as a national and citizen of the United States" [Finding of Fact IV, R. 15]. This finding, although nominally a finding of fact, is in substance a conclusion of law; and this Court is not bound by the rule that findings shall not be set aside unless clearly erroneous (Rule 52(a), Federal Rules of Civil Procedure), but is free to draw its own conclusions (*Stevenot v. Norberg,* 210 F. 2d 615, 619 (C. A. 9, 1954); *Plomb Tool Co. v. Sanger,* 193 F. 2d 260, 264 (C. A. 9, 1952), cert. den., 343 U. S. 919; *Brown v. Cowden Livestock Co.,* 187 F. 2d 1015, 1017-1018).

Appellees' passport application was executed on May 6, 1952 [R. 25] and her complaint was filed on December 22, 1952 [R. 5]. Thus, the delay which the District Court found to be unreasonable amounted to only 7 months and 17 days. Even if Rule 52(a) were applicable,

in view of the statutory duty imposed upon appellant to make an administrative determination of appellee's nationality prior to issuing a passport; the scant evidence submitted by appellee to aid in such determination; the inability, due to appellee's place of birth and prior residence, to verify her nationality through official sources; and the congestion of the administrative calendar at the American Consulate at Hong Kong, caused by a deluge of similar applications; the finding of the District Court that a delay of only 7½ months in passing upon appellee's passport application was unreasonable, is clearly erroneous.

The authority to issue passports has been conferred by statute upon the Secretary of State under such rules as might be prescribed by the President (Sec. 1 of the Act of July 3, 1926, 44 Stat. 887, 22 U. S. C. A., Sec. 211a); and Congress has prohibited the issuance of passports to persons other than those owing allegiance to the United States (Sec. 4076, Revised Statutes of the United States, as amended by the Act of June 14, 1902, 32 Stat. 386, 22 U. S. C. A., Sec. 212).[4] By executive order, the Secretary of State is empowered to "require such additional evidence of citizenship as in his judgment may be necessary to establish the citizenship of an applicant for a passport" (Ex. Order 7856, 22 C. F. R., Sec. 51.65).[5]

The statutes referred to above manifest a Congressional intent that an administrative determination of United

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[4]Of course "alien passports" may be issued (Act of Mar. 2, 1921, 41 Stat. 1217, 22 U. S. C. A., Sec. 227); however, appellee did not apply for a passport as an alien, but as a citizen [R. 23].

[5]Ex. Order 8820, 22 C. F. R. 107.3, authorizes officers of the Foreign Service to issue passports to American nationals pursuant to such provisions of Ex. Order 7856 as may be applicable to the issuance of passports abroad.

States nationality and/or citizenship should precede the issuance of a passport, since granting of passports to persons other than those owing allegiance to the United States is prohibited. Thus, when appellee filed her application for a passport as a citizen, she did not thereby acquire an immediate "right" to the issuance of a passport; nor did she acquire an immediate right to a determination of her claim to citizenship. She was only entitled to have her claim processed in accordance with normal administrative procedures, considering all the facts and circumstances of the case.

Appellee alleged birth on the mainland of China on April 28, 1941 [R. 3], where she had lived from the date of her birth until March 16, 1952, when she came to Hong Kong [R. 26]. She did not submit a birth certificate or other official documentary evidence in support of her application, as is normally available in other countries [R. 66]; nor did she submit any old letters, family photographs, or other documents attesting to the genuineness of her claimed relationship. The only evidence submitted by appellee was an affidavit of her alleged father, Tam (Hom) Tong Gong [R. 54-57]. Because the mainland of China was "closed" to the United States at the time appellee's passport application was filed, it was impossible to verify her name, place of birth, places of residence, and family history from official sources [R. 59-60]. It was thus necessary for the Consul General to attempt to obtain and evaluate secondary evidence of appellee's citizenship.

Nor was appellee entitled to priority in the processing of her application, since a large number of similar applications had been filed. Defendant's Exhibit C, an authenticated Statement Regarding the Processing of Pass-

port Applications at the American Consulate General in Hong Kong [R. 58-69], discloses that with the closing of the American Consulate General at Canton in 1949, a heavy load of citizenship cases was transferred to Hong Kong [R. 58]; that a deluge of applications later descended on the Consulate General at Hong Kong at the rate of 150 per month [R. 59, 61]; that lack of funds, personnel, and office space limited the number of applications which could be processed [R. 64-65]; that as of September 1, 1952, more stringent examination and investigation procedures were authorized, including the blood-typing of claimants and their alleged parents, since the State Department's review of the citizenship claims passed upon at Hong Kong convinced it that a large number of fraudulent claimants were proceeding to the United States [R. 62]; and that the more detailed examination and investigation of claims and the incidence of court actions requiring work on applications for certificates of identity under Section 503 of the Nationality Act of 1940, slowed down the rate of processing claims [R. 62].

In view of the foregoing, it is submitted that the delay of only seven and one-half months here involved was not unreasonable, and that the conclusion of the District Court to the contrary was clearly erroneous. The decisions which have found an implied denial from delay involved periods of substantially greater length. For example, in *Chin Chuck Ming v. Dulles,* 225 F. 2d 849 (C. A. 9, 1955), an affidavit-application[6] for passport was filed

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[6]In the present case appellee filed an affidavit of her alleged father. However, this affidavit, although executed on November 12, 1951 [R. 57], was not filed with the American Consulate at Hong Kong until May 5, 1952 [R. 54—See Stamp], one day before her passport application was executed. Even if this affidavit is considered as an application, it would add only one day to the period of delay.

with the American Consulate General at Hong Kong on September 6, 1951, and a period of 15 months and 16 days elapsed between the date of such filing and the institution of court action. And in *Wong Ark Kit v. Dulles,* 127 Fed. Supp. 871 (D. Mass., 1955), a period of almost three years elapsed between the date an affidavit was executed by plaintiff's alleged father and the date suit was brought. These decisions not only lack persuasive weight as applied to the facts of the case at bar, but emphasize the fact that a delay of only 7½ months was not unreasonable.

III.

The Savings Clause of the 1952 Act Does Not Permit a Suit as to Which There Was No Jurisdiction When Section 503 Was Repealed to Be Jurisdictionally Revived by Virtue of an Express Administrative Denial of the Claimed Right After the New Act Took Effect.

A. Preliminary.

As has previously been shown, appellee had not been denied a right or privilege as a national of the United States upon the grounds that she was not such a national, either actually or constructively, when her suit was brought or when Section 503 was repealed. However, her application for passport was expressly denied by the Secretary of State on September 23, 1954. The issue is thus presented as to whether the savings clause contained in the Immigration and Nationality Act of 1952 permitted her suit to be jurisdictionally revived by virtue of the express administrative denial of the claimed right after the new Act took effect. Appellant submits that it did not.

In *Fujii v. Dulles,* 224 F. 2d 906 (C. A. 9, 1955), this Court used language to the effect that where suit was instituted before the repeal of Section 503, the savings clause of the 1952 Act preserved the right to maintain such suit, if an application (for registration as a citizen) was filed before the repeal of the 1940 law, even though such application was not denied until after that time. Judge Denman declared (pp. 907-908):

> "* * * The saving clause of §405(a) of the Immigration and Nationality Act of 1952, 8 U. S. C. A., §1101 note, provides that it shall not be 'construed to affect' a proceeding under §903 such as is Fujii's here.
>
> Speaking of an amendment made in Congress to §405(a), the Supreme Court states in United States v. Menasche, 348 U. S. 528, 75 S. Ct. 513, 518, 99 L. Ed. ....., that 'The change in the section was designed to extend a savings clause already broadly drawn, and embodies, we believe, congressional acceptance of the principle that the *statutory status quo was to continue even as to rights not fully matured.*' (Emphasis supplied.) Fujii had the right to litigate his case before the district court though his right thereto had not fully matured on December 24, 1952."

The above quoted language from *Fujii* was not essential to a decision of that case. Fujii's suit had been brought on December 16, 1952. His amended complaint alleged that a certificate of loss of nationality had been approved by the Secretary of State on December 18, 1952, and

the District Court in its opinion so found.[7] However, an affidavit by an Assistant United States Attorney had stated that the certificate of loss had not been approved by the Secretary of State until March 18, 1953, and Judge Denman *"for the purposes of* [*his*] *opinion"* (224 F. 2d 907—emphasis added), assumed that the approval had occurred on the latter date. Since the District Court had found that the approval had occurred on December 18, 1952, and since in *Suda v. Dulles,* 224 F. 2d 908 (C. A. 9, 1955), this Court held that such approval constituted a sufficient denial, the application of the savings clause in *Fujii* would seem unnecessary.[8] This court may therefore treat the issue here involved as not having been previously adjudicated.

The savings clause in the 1952 Act did not jurisdictionally revive appellee's suit because the "right" to institute an action under Section 503 does not come within the purview of general phrases contained in the savings clause, such as "right in process of acquisition," and because the savings clause of the 1952 Act, even if construed to encompass such a "right," cannot revive appellee's action, since jurisdiction depends upon the state of things existing at the time suit is brought.

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[7]The District Court said (122 Fed. Supp. at p. 262): ". . . on December 18, 1952, the State Department sent a telegram to the American Consul at Kobe approving a number of Certificates executed by him, one of which was the plaintiff's."

[8]The Department of State has advised that the approval of Fujii's certificate of loss was contained in the same message as the approval of Suda's.

B. Procedural Remedies Were Not Preserved by the Savings Clause.

In determining the effect of a general savings clause upon repealed statutes, the courts have been careful to distinguish between statutes, such as Section 503, which create mere procedural "rights" or remedies, and statutes which create substantive rights and liabilities. The latter type of statute is preserved by a general savings clause, while the former is not (*Bridges v. United States,* 346 U. S. 209, 224-227 (1953); *De La Rama S.S. Co. v. United States,* 344 U. S. 386 (1952); *Hallowell v. Commons,* 239 U. S. 506 (1916); *Aure v. United States,* 225 F. 2d 88, 90 (C. A. 9, 1955); *United States v. Obermeir,* 186 F. 2d 243, 250-256 (C. A. 2, 1952), cert, den. 340 U. S. 951; *Matsuo v. Dulles,* 133 Fed. Supp. 711 (S. D. Calif., 1955)).

In *Aure v. United States, supra,* this Court was confronted with the issue of whether a right to naturalization existed under the 1940 Act was preserved by the savings clause of the 1952 Act, so as to enable such right to be exercised after the effective date of the latter statute. Following a careful analysis of the recent decision of the Supreme Court in *United States v. Menasche,* 348 U. S. 528 (1955), this Court observed (p. 90):

> "* * * *The real test is whether the 'right' which the alien seeks to have preserved by the savings clause is a substantive right,* and in this regard we are mindful of the distinction between substantive rights and procedural remedies. * * *" (Emphasis added.)

And in *De La Rama S.S. Co. v. United States, supra,* the Supreme Court had occasion to distinguish between

the effect of a general savings clause upon those statutes solely jurisdictional in scope and its effect upon statutes in which substantive rights are fused with procedural remedies. In that case a war risk policy had been issued under the War Risk Insurance Act of 1940, as amended, which statute authorized suit on the policy in a Federal District Court. The Court held that the substantive right to recover on the policy and the forum in which suit was to be brought were "fused components of the expression of a policy," and that a general savings clause preserved the right to maintain suit in the District Court. In so doing, however, the Court was careful to recognize the following distinction (p. 390):

> "The Government rightly points to the difference between the repeal of *statutes solely jurisdictional in their scope and the repeal of statutes which create rights and also prescribe how the rights are to be vindicated.* In the latter statutes, 'substantive' and 'procedural' are not disparate categories; they are fused components of the expression of a policy. When the very purpose of Congress is to take away jurisdiction, of course it does not survive, even as to pending suits, unless expressly reserved. *Ex parte McCardle,* 7 Wall. 506, is the historic illustration of such a withdrawal of jurisdiction, of which less famous but equally clear examples are *Hallowell v. Commons,* 239 U. S. 506, and *Bruner v. United States,* 343 U. S. 112. *If the aim is to destroy a tribunal or to take away cases from it, there is no basis for finding saving exceptions unless they are made explicit.* * * *" (Emphasis added.)

Section 503 of the Nationality Act of 1940 was "solely jurisdictional" in its scope (See, *Hallowell v. Commons, supra*). It did not provide a means of acquiring nation-

ality,[9] but a forum for determining its existence. A judgment under Section 503 does not confer nationality, nor does it take nationality away, but merely adjudicates an already existing status (See, *Acheson v. Fujiko Furusho,* 212 F. 2d 284, 292, 296 (C. A. 9, 1954)). Thus, the reference in *United States v. Menasche,* 348 U. S. 528 (1955) to "rights not fully matured" has no application to the "right" to institute an action under Section 503, but refers to substantive rights and liabilities. Section 503 created merely a procedural remedy which was not preserved by the savings clause (*Matsuo v. Dulles, supra; Yamamoto v. Dulles,* 16 F. R. D. 195, 198 (D. Hawaii, 1954); *D'Argento v. Dulles,* 113 Fed. Supp. 933 (D. C. Dist of Col., 1953); *Ng Gwong Dung v Brownell,* 112 Fed. Supp. 673, 674 (S. D. N. Y., 1953); *Avina v. Brownell,* 112 Fed. Supp. 15, 19-20 (S. D. Texas, 1952)).

C. Congress Intended to Cut Off the Right to Institute an Action Under Section 503.

The language of this Court in *Fujii v. Dulles, supra,* indicates that the statutory *status quo* was to continue as to Fujii's "right" to institute an action under Section 503 of the Nationality Act of 1940, even though such right had not fully matured on December 24, 1952. The far-reaching implications of this reasoning is illustrated by *Wong Kay Suey v. Brownell,* 227 F. 2d 41 (C. A. Dist.

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[9]*United States v. Menasche,* 348 U. S. 528 (1955) and *Bertoldi v. McGrath,* 178 F. 2d 977 (C. A. Dist. Col., 1949), afford examples of a general savings clause being applied to preserve a substantive right of citizenship in the process of being acquired under prior law.

Col., 1955), cert. den. 24 L. W. 3225.[10] In the latter case the Court applied the savings clause to enable one who had been denied a right or privilege before repeal of Section 503 to institute an action under that statute during 1954, long after the effective date of the repeal.[11] The language in both *Fujii* and *Suey* assumes, appellant believes erroneously, that the "right" to institute an action under Section 503 comes within the purview of the general phrase contained in the savings clause of the 1952 Act: "right in process of acquisition"; and the language in both would seem to be contrary to the manifest intent of Congress.

The legislative history of the 1952 Act discloses that Congress intended to cut off the right to bring a declaratory judgment action under Section 503. One of the problems which had arisen under Section 503 had been the number of cases where persons, largely in derivative citizenship cases, had employed this statute solely for the

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[10]No inference, of course, can be drawn from the denial by the Supreme Court of certiorari (*Brown v. Allen,* 344 U. S. 443, 489-497 (1953).) This is particularly true here because in the District of Columbia, where the *Suey* case arose, it was possible to institute an action for declaration of nationality even before a specific statute was enacted for that purpose (*Perkins v. Elg,* 307 U. S. 325 (1939); *Matsuo v. Dulles,* 133 Fed. Supp. 711, 713 (S. D. Cal., 1955)).

[11]The State Department has advised that during the five years from 1948 to 1952, 37,518 certificates of loss of nationality were approved pursuant to Section 501 of the Nationality Act of 1940, 54 Stat. 1137, 8 U. S. C. A., Sec. 901. Under the reasoning of *Fujii* and Suey, the door is now open to all those citizenship claimants (not resident in this country) who have not previously done so to institute suits for declaratory judgment under former Section 503. In addition, persons abroad claiming nationality as the foreign born children of American parents, who applied for documentation before December 24, 1952 could institute such actions. While the exact number of the latter type of cases is not known, it is believed to be considerable.

purpose of gaining entry into the United States. In the broad study of the working of the existing immigration and nationality laws, represented by Senate Report 1515, 81st Cong., 2d Sess., which culminated in the 1952 Act, the following observation is made (p. 777):

> "In spite of the definite restrictions on the use and application of section 503 to bona fide cases, the subcommittee finds that the section has been subject to broad interpretation, and that *it has been used, in a considerable number of cases, to gain entry into the United States where no such right existed.* The subcommittee also feels that the statute should be limited as to time within which such an action may be brought. The subcommittee therefore recommends that the provisions of section 503 as set out in the proposed bill be modified to limit the privilege to persons who are in the United States, and that any such action shall be brought within 5 years after the finding that the person is not a national of the United States." (Emphasis added.)

The hearings on the McCarran-Walter bill (which became the 1952 Act) indicate that the concern was with "the fraud and the derivative citizenship cases," and with the fact that aliens not entitled to admission were gaining physical entry into the United States and disappearing into the general population. (Joint Hearings before the Subcommittees of the Committees on the Judiciary, 82nd Cong., 1st Sess. on S. 716, H. R. 2379, and H. R. 2816, p. 443, see also pp. 108-109).

Congress enacted Section 360 of the Immigration and Nationality Act of 1952, 66 Stat. 273, 8 U. S. C. A., Sec. 1503, which sharply restricted the circumstances under which an action for declaration of nationality could be instituted. The successor statute permits declaratory

judgments of American nationality only where a "person who is within the United States" is denied a right or privilege as an American national on the ground of alienage, and *precludes such action where the issue* of nationality arose "by reason of, or in connection with any exclusion proceeding under the provisions of this or any other act" or "is in issue in any such exclusion proceeding." (*Nevarez v. Brownell,* 218 F. 2d 575 (C. A. 5, 1955); *Matsuo v. Dulles,* 133 Fed. Supp. 711, 715 (S. D. Cal., 1955); *Gonzalez-Gomez v. Brownell,* 114 Fed. Supp. 660 (S. D. Cal., 1953)). Under the new Act, claimants outside the United States are allowed judicial consideration of their claims only by habeas corpus after they have come to this country on certificates of identity and been denied admission (See, Secs. 360(b) and (c); *Avina v. Brownell,* 112 Fed. Supp. 15 (S. D. Tex., 1952)); and persons who are over sixteen when they apply for such certificates are not eligible to come to this country to have their claims considered unless they have previously been in this country (See, Sec. 360(b)). The enactment of the present Section 360, instead of the alternative suggestion that the pattern of former Section 503 be continued,[12] thus represents a clear Congressional decision to curtail the scope of declaratory judgment review.

In view of the foregoing, it is inconceivable that Congress intended to keep Section 503 in force indefinitely, either for the purpose of instituting new suits (*Wong Kay Suey v. Dulles, supra*) or for the purpose of reviving a

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[12]The revisions of procedure originated in the Senate bill. The House bill continued the provisions of former Section 503. See S. Rep. 1137, 82nd Cong., 2d Sess., p. 50; H. Rep. 1365, 82nd Cong., 2d Sess., p. 87. The Senate formulation ultimately prevailed.

suit as to which there was no jurisdiction when Section 503 was repealed (language in *Fujii v. Dulles, supra*). Instead, it is clear that Congress was dissatisfied with the operation of Section 503, and meant to limit strictly its operation.

It should be emphasized that in repealing Section 503 of the 1940 law and enacting Section 360 of the 1952 Act, Congress was not thereby depriving appellee of citizenship, but was merely changing the manner in which her citizenship should be determined (*Gonzalez-Gomez v. Brownell,* 114 Fed. Supp. 660, 661 (S. D. Cal., 1953). There is no vested right in procedure which makes it immune to change by Congress *Barber v. Yanish,* 196 F. 2d 53, 54, footnote 1 (C. A. 9, 1952), and cases cited therein; *Avina v. Brownell,* 112 Fed. Supp. 15, 19-20 (S. D. Tex., 1953)); and a change in remedy is generally construed as being immediately applicable (See, *Ex parte Collett,* 337 U. S. 55, 71; *Bruner v. United States,* 343 U. S. 112, 116-117; *United States v. Stromberg,* 227 F. 2d 903 (C. A. 5, 1955).[13] Consequently, the doctrine of liberal construction enunciated in *Schneiderman v. United States,* 320 U. S. 118, 122 (1943) should not be permitted to modify the general rule regarding the applicability of a general savings clause to statutes solely procedural in nature, nor to override the manifest intent of Congress. This is particularly true in the case at bar, *since appellee, being under 16 years of age, may yet apply under Section*

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[13]In *United States v. Stromberg, supra,* the Court held that "liability" to denaturalization on the ground of illegal procurement as provided for in the 1940 law was not preserved by the savings clause of the 1952 Act, and that an amendment charging illegal procurement after the 1952 Act became effective did not relate back to the date of the original complaint which was filed on September 11, 1952.

360(b) of the Immigration and Nationality Act of 1952 for a certificate of identity to come to the United States and have her citizenship administratively determined with a right of judicial review in habeas corpus.

D. The Savings Clause of the 1952 Act, Even if Applicable, Could Not Jurisdictionally Revive Appellee's Suit.

Appellee's suit was instituted on December 22, 1952 [R. 5]. Neither at that time, nor on December 24, 1952 when Section 503 of the Nationality Act of 1940 was repealed, had appellee been denied a right or privilege as a national of the United States upon the grounds that she was not such a national. Consequently, the savings clause of the 1952 Act, even if applicable, could not jurisdictionally revive her suit, since jurisdiction depends upon the state of things existing at the time suit is brought. This principle was recently enunciated in *Yung Ting Yeung v. Dulles,* 229 F. 2d 244 (C. A. 2, 1956), where the court, criticizing *Fujii v. Dulles, supra,* remarked (p. 248):

> "[5, 6] In support of this argument plaintiffs cited Junso Fujii v. Dulles, 9 Cir., 1955, 224 F. 2d 906. In the Fujii case the Court held that the 'saving clause' of the 1952 Act provides that the new Act shall not affect a suit brought under §503 of the 1940 Act prior to December 24, 1952 and that such a suit may therefore be maintained even though there was no denial of a right at the time it was brought. *This ruling over looks the fact that even under the 1940 Act such a suit would have had to be dismissed.* Under §503 the denial of 'a right or privilege as a national' was a prerequisite to jurisdiction in the District Court. *Jurisdiction depends upon the state of things existing at the time suit is brought.* Minneapolis & St. Louis Railroad Co. v. Peoria & Pekin Union Railway Company, 1926, 270 U. S. 580, 586,

46 S. Ct. 402, 70 L. Ed. 743. Thus even if §503 had not been repealed by the 1952 Act, 8 U. S. C. A. §1101 *et seq.*, it would be necessary to dismiss the suits unless the plaintiffs could show that they had been denied passports prior to commencement of suit. *The saving clause of the 1952 Act certainly does not give plaintiffs greater rights than they would have had if that Act had not been passed.* * * *" (Emphasis added.)

Conclusion.

Wherefore for the reasons set forth above, it is respectfully submitted that the judgment of the District Court should be reversed and the cause remanded, with directions to dismiss appellee's action for lack of jurisdiction.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief of Civil Division,

JAMES R. DOOLEY,
Assistant U. S. Attorney,

Attorneys for Appellant.